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IN THE

Supreme Court of the United States

October Term, 1997

ROBERT FICALORA,
Petitioner,
v.
INTERNATIONAL BUSINESS MACHINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether conflicts of interest which may have influenced the decision of an ERISA plan administrator to deny benefits must be weighed as a factor in determining whether the decision was an abuse of discretion.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

Certiorari Should Be Granted to Resolve a Split Among the Circuits Regarding Standard of Review of Benefit Denials by ERISA Administrators or Fiduciaries Operating under Conflicts of Interest. 8

CONCLUSION 14

APPENDIX A . . . . . A 1

APPENDIX B . . . . . B 1

APPENDIX C . . . . . C 1

TABLE OF AUTHORITIES

FEDERAL CASES

Armstrong v. Aetna Life Insurance Company,
128 F.3d 1263 (8th Cir. 1997) 9,10,11

Atwood v. Newmont Gold Co., Inc.,
45 F.3d 1317 (9th Cir. 1995) 6,7,9,10,11,12,13

Best v. Nissan Motor Corp.,
973 F. Supp. 770 (M.D. Tenn. 1997) 9

Brown v. Blue Cross & Blue Shield of Alabama,
898 F.2d 1556 (11th Cir. 1990), cert. denied,
498 U.S. 1040 (1991) 9

Buttram v. Central States Welfare Fund,
76 F.3d 896 (8th Cir. 1996) 8

Central States Pension Fund v. Centr. Transport,
472 U.S. 559 (1985) 13

Chambers v. Family Health Plan Corp.,
100 F.3d 818 (10th Cir. 1996) 9,11

Ellis v. Metropolitan Life Insurance Co.,
126 F.3d 228 (4th Cir. 1997) 9,12

Firestone v. Bruch,
489 U.S. 101 (1989) 8,10,11,13

Palmer v. University Medical Group,
973 F. Supp. 1179 (D. Ore. 1997) 12,13

Patterson v. Shumate,
504 U.S. 753 (1992) 13

Taft v. Equitable Life Assur. Soc.,
9 F.3d 1469 (9th Cir. 1993) 12

Van Boxel v. Journal Co. Employees' Pension Trust,
836 F.2d 1048 (7th Cir. 1987) 9

Wildbur v. ARCO Chemical Co.,
974 F.2d 631 (5th Cir. 1992) 9

FEDERAL STATUTES

28 U.S.C. § 1254 2

29 U.S.C. § 1001 et seq. 3,13

29 U.S.C. § 1132 3,8

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

ROBERT FICALORA,
Petitioner,
v.
INTERNATIONAL BUSINESS MACHINES, INC.,
Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Robert Ficalora respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 15, 1997.

---

[1] The parties to the proceedings below were the petitioner Robert Ficalora and the respondents International Business Machines, Inc.; IBM Medical Disability Income Plan (MDIP); Chase Manhattan Bank, Trustee of the MDIP; J.J. Sinnott; Michael A. Tarre; Dr. Arnold Kaminer; Dr. Charles Grose; Dr. Steve Redmond; W.R. Matson; D.A. Peguero; T.L. Richards; and Dr. D.B. Robbins.

OPINIONS BELOW

The opinion of the Court of Appeals, which was not published, is attached as Appendix A. The opinion of the District Court for the Western District of Washington, which also was not published, is Appendix B. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc is Appendix C.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals affirming the dismissal of petitioner's claims was entered on September 15, 1997. Petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied in an order filed October 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., and, in particular, § 1132(a)(1)(B), which provides:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought--
>
> (1) by a participant or beneficiary--
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

STATEMENT OF THE CASE

After petitioner Robert Ficalora worked for International Business Machines, Inc. ("IBM") for eleven years, he developed chronic progressive multiple sclerosis ("MS"), a form of the disease that has a "steady downhill course." App. A 24. Mr. Ficalora applied for long-term disability benefits under the Medical Disability Income Plan, a plan funded and administered by IBM. IBM denied his application, claiming Ficalora had no clear diagnosis. Mr. Ficalora then underwent an Magnetic Resonance Imaging exam ("MRI") that established he had MS, and, in support of an administrative appeal of the denial, provided IBM with the results. He also wrote a

letter to IBM President Jack Kuehler, requesting "any help you can provide in my appeal."

IBM -- which was both the decisionmaker and the potential payor of over thirty years of disability benefits -- denied Mr. Ficalora's appeal. Its Plan Administrator, Mr. J. Sinnott, told him, "you had to get the President involved . . . we are not going to pay you for the rest of your life."

The stated basis for denial was that there was "insufficient objective medical information in the record indicating that, though Mr. Ficalora had MS, he was unable to 'take any employment for pay or profit.'" The only evidence supporting IBM's position that Mr. Ficalora could work was a 1991 note by Dr. Philip Swanson, a neurologist retained by IBM. App A 23. The note, written in the margin of a letter from IBM, stated that Mr. Ficalora had no "clear physical limitation."

IBM found that Dr. Swanson's note overcame the statements of Mr. Ficalora's treating doctors. One of those physicians, Dr. Roy Swank, of the Swank Multiple Sclerosis Clinic of Oregon Health Sciences University, had stated that Mr. Ficalora should retire due to his MS, that he was not "able to continue to do satisfactory work" and that he was "disabled now [and] in the foreseeable future." A second treating physician, Dr. Richard Blanck, opined that Mr. Ficalora's "physical limitations are permanent from a medical standpoint." The Social Security Administration

found Mr. Ficalora "incapable of performing any past relevant work." App. A 25.

Shortly after IBM denied benefits on January 21, 1993, Mr. Ficalora was again examined by Dr. Swanson, the neurologist originally retained by IBM. Dr. Swanson wrote on March 12, 1993:

> His neurological condition (multiple sclerosis) has progressed so that he now has some abnormalities on examination that were not present before. His symptoms are worsened by fatigue.
>
> I concur that he should seek retirement from his job at IBM.

Mr. Ficalora provided IBM this letter as part of an appeal of the benefit denial. IBM responded on March 19, 1993 that Dr. Swanson's "letter mentions 'abnormalities on examination,' but it does not say what those signs or findings actually were."

Five months later, on August 20, 1993, IBM offered "additional review" -- but only if Mr. Ficalora would agree to be examined by a new neurologist of IBM's choosing. Mr. Ficalora, believing this request was an attempt to obtain an opinion that would justify the previous benefit denial, responded that he would be seen by the doctors IBM had previously selected. IBM rejected that proposal. On February 14, 1994, IBM wrote to Mr. Ficalora "we have now reached a point where it appears

that there will not be agreement on any further review by the plan administrator."

Mr. Ficalora then filed suit in United States Court for the Western District of Washington, invoking that court's jurisdiction under 29 U.S.C. § 1132. IBM moved for summary judgment dismissal of the case, arguing that there was no basis for finding an abuse of discretion. In response, Mr. Ficalora argued that because the Plan Administrator operated under a conflict of interest, and because there was evidence tending to show that IBM's self-interest influenced its decision, heightened review was justified.

IBM answered with a declaration stating that Plan Administrator Sinnott "had no role in the ultimate decision" to deny benefits. The district court rejected Mr. Ficalora's assertion that Mr. Sinnott's statement was evidence that the benefit denial was influenced by IBM's conflict of interest, as required by Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317 (9th Cir. 1995). Accordingly, it applied the ordinary "abuse of discretion" standard of review, with no special weight given to the conflict of interest. App. B 8. Under that standard, it granted IBM's motion.

Mr. Ficalora appealed, but a divided panel of the Ninth Circuit affirmed. The Court of Appeals disagreed with the district court by finding that Mr. Ficalora "satisfied his burden" in the first stage of the Atwood

inquiry with Mr. Sinnott's statement, which it found to be "'material, probative evidence'" that the conflict "'caused a breach of the administrator's fiduciary obligations to [Mr. Ficalora.]'" App. A 5-6, quoting Atwood v. Newmont Gold, 45 F.3d at 1323. However, the panel majority determined that, at the second stage of the Atwood test, IBM had rebutted the showing that the conflict influenced its benefit denial. Following Atwood, it thus affirmed the district court's dismissal of Mr. Ficalora's suit by applying an ordinary abuse of discretion standard of review. Id.

Judge Pregerson dissented, finding that "the Plan Administrator abused his discretion." App. A 27.

REASON FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve a Split Among the Circuits Regarding Standard of Review of Benefit Denials by ERISA Administrators or Fiduciaries Operating under Conflicts of Interest.

In Firestone v. Bruch, 489 U.S. 101, 115 (1989), this Court held that a denial of ERISA benefits challenged under 29 U.S.C. § 1132(a)(1)(B) should be reviewed de novo, unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits. If such discretionary authority is granted the administrator, review is for "abuse of discretion." Even under that standard of review, however, an administrator's conflict of interest must be considered:

> Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion." Restatement (Second) of Trusts § 187, Comment d (1959).

Firestone v. Bruch, 489 U.S. at 115.

"Although all courts agree" that the decisions of a conflicted administrator "trigger a less deferential standard of review, the circuits are split on how this lesser degree of deference actually alters the review process." Buttram v. Central States Welfare Fund, 76 F.3d 896, 900, n.6. (8th Cir. 1996). When faced with an administrator or fiduciary

operating under a conflict of interest, the Fourth, Fifth, Seventh and Tenth Circuits use a "sliding scale" approach. The Fourth Circuit summarized this approach as follows:

> . . . the court modifies [the] abuse of discretion standard according to a sliding scale. The more incentive for the administrator or fiduciary to benefit itself by a certain interpretation of benefit eligibility or other plan terms, the more objectively reasonable the administrator or fiduciary's decision must be and the more substantial the evidence must be to support it.

Ellis v. Metropolitan Life Insurance Co., 126 F.3d 228, 233 (4th Cir. 1997). See also Wildbur v. ARCO Chemical Co., 974 F.2d 631, 638 (5th Cir. 1992); Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052-53 (7th Cir. 1987); and Chambers v. Family Health Plan Corp., 100 F.3d 818, 826 (10th Cir. 1996).[2]

The Eighth, Ninth and Eleventh Circuits have adopted an approach that the Ninth Circuit characterized as "very different" from the sliding scale. Atwood, 45 F.3d at 1322. See Brown v. Blue Cross & Blue Shield of Alabama, 898 F.2d 1556 (11th Cir. 1990), cert. denied, 498 U.S. 1040 (1991); Armstrong v. Aetna Life Insurance

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[2] A district court in the Sixth Circuit, after contrasting the Atwood v. Newmont Gold analysis and the sliding scale test, held the sliding scale test was most consistent with Sixth Circuit precedent. Best v. Nissan Motor Corp., 973 F. Supp. 770, 776 (M.D. Tenn. 1997).

Company, 128 F.3d 1263, 1265 (8th Cir. 1997). Rather than decreasing the deference given a conflicted administrator, Atwood requires a two-step "burden shifting" analysis. If the beneficiary can produce "material, probative evidence that a conflict caused the administrator to breach its fiduciary obligations," the administrator's decision is presumptively void and the burden shifts to the administrator to show the conflict did not affect its decision. Atwood v. Newmont Gold , 45 F.3d at 1323. If the plan administrator meets this burden, the court "ultimately appl[ies] a traditional abuse of discretion standard," and the conflict receives no further consideration. Id. at 1322.

The Atwood test thus permits the conflict to be removed from the analysis altogether -- as it was in this case, simply on the basis of a self-serving declaration of IBM's Plan Admin[illegible]tor. That result, however, is inconsistent with this Court's instruction that a conflict "must" be weighed as a factor in determining whether a fiduciary abused its discretion. Firestone v. Bruch, 489 U.S. at 115. This inconsistency was the reason for the Tenth Circuit's rejection of the Atwood approach:

> We reject the "presumptively void" test as inconsistent with . . . the Supreme Court's dictum in Firestone. We conclude that the sliding scale approach more closely adheres to the Supreme Court's instruction to treat a conflict of interest as a

> 'facto[r] in determining whether there is an abuse of discretion.'

Chambers v. Family Health Plan Corp., 100 F.3d at 826. The inconsistency was also noted in a dissent from the majority's rejection of the sliding scale approach in Armstrong v. Aetna, 128 F.3d 1263. Citing this Court's statement in Firestone v. Bruch that a conflict "must" be weighed as a factor, Judge Beam stated:

> It is difficult, if not impossible, to read this language from Firestone Tire contrary to the sliding scale approach -- under which the reviewing court always applies an abuse of discretion standard but decreases the amount of discretion given to the administrator's decision in proportion to the seriousness of the conflict -- established by the Fourth, Fifth, Seventh and Tenth Circuits.

Armstrong v. Aetna, 128 F.3d at 1267 (Beam, J.).

The Atwood test is not only inconsistent with this Court's direction in Firestone v. Bruch, supra, it is also unworkable and unrealistic. The first step of the test places a nearly impossible burden on a beneficiary. It is highly unlikely that the requisite "material, probative evidence" would be found by a beneficiary, as a plan administrator is unlikely to document the effect its self-interest had on its decision. Moreover, there is "an inherent tension between the requirement that the parties offer evidence proving the decision was (or was not) tainted by the conflict of interest, and the rule that review

of ERISA decisions is limited to the administrative record." Palmer v. University Medical Group, 973 F.Supp 1179, 1188 (D. Ore. 1997). See, e.g., Taft v. Equitable Life Assur. Soc., 9 F.3d 1469, 1471 (9th Cir. 1993).

The Ninth Circuit's decision in this case embodies the problem of Atwood's burden-shifting rule. As long as IBM was the potential payor of thirty years of disability benefits, it operated under an undisputed conflict of interest. That conflict could never be eliminated or disproved. Moreover, there was actual evidence that IBM's self-interest was involved: the Plan Administrator's statement that "**we** are not going to pay you for the rest of your life." However, because the court found no direct evidence that the IBM employee who made the final decision was included in the "we" used by his predecessor, the entire conflict evaporated from the analysis and was given no weight as factor in the ultimate determination of whether IBM abused its discretion. This despite the inherent difficulty of "proving" the influence of a conflict of interest.

Under the sliding scale approach, IBM's conflict of interest would have triggered a less deferential standard of review, requiring a "more objectively reasonable" decision by the plan administrator, supported by "more substantial" evidence. Ellis v. Metropolitan Life, 126 F.3d at 233. Such a review would have revealed that the record was all

but barren of evidence to support IBM's position that Mr. Ficalora could work, as demonstrated by Judge Pregerson's dissent. See pages A-12 through A-27.

Uniform national treatment of employee benefits is an "important policy underlying ERISA." Patterson v. Shumate, 504 U.S. 753, 765 (1992). The "continued well-being and security of millions of employees and their dependents are affected by [ERISA] plans." Central States Pension Fund v. Centr. Transp., 472 U.S. 559, 569 (1985) (quoting Congressional findings at 29 U.S.C. § 1001(a)). Presently, "there is no clear consensus on how to incorporate" a conflict of interest into the review process. Palmer v. University Medical Group, 973 F.Supp. at 1182. Uniformity of federal law regarding conflicted ERISA administrators should be established by granting certiorari here and determining whether Firestone's principles require the "sliding scale" approach used by most Circuits or the "very different" Atwood burden-shifting test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. FICALORA,	) No. 96-35229
	)
Plaintiff-Appellant,	)
	) D.C. No. CV-95-05342-RJB
v.	)
	) MEMORANDUM*
INTERNATIONAL BUSINESS MACHINES CORPORATION, a Delaware corporation licensed to conduct business in Washington; J. J. SINNOTT, IBM Plan Administrator; INTERNATIONAL BUSINESS MACHINES, INC., MEDICAL DISABILITY INCOME PLAN; CHASE MANHATTAN BANK, Trustee of MDIP; MICHAEL A. TARRE, MDIP Administrator; ARNOLD J. KAMINER; CHARLES D. GROSE, M.D.; STEVE REDMOND, M.D.; W.R. MATSON;	)

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

D. A. PEGUERO; T.L. RICHARDS; D. B. ROBBINS, M.D.

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted June 5, 1997
Seattle, Washington

Before: WRIGHT, PREGERSON and THOMPSON, Circuit Judges.

In 1980, International Business Machines (IBM) employed Robert A. Ficalora. In 1988, Ficalora began experiencing vision loss, fatigue, and numbness. After his doctor diagnosed him with multiple sclerosis (MS), Ficalora applied for benefits under IBM's Medical Disability Income Plan (MDIP or the Plan). The Plan Administrator denied Ficalora's request for benefits because Ficalora did not demonstrate that MS prevented him from being gainfully employed, as required by the Plan.

Ficalora then sued IBM in federal district court to enforce his right to benefits under the Plan, pursuant to Section 1132(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA). The district court granted summary judgment in IBM's favor, and Ficalora appeals.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

STANDARD OF REVIEW

A denial of benefits under ERISA should be "reviewed under a de novo standard unless the benefit plan gives the administrator . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). If an ERISA plan vests a plan administrator with such discretionary authority, however, "a district court may review the administrator's determination only for an abuse of discretion." Winters v. Costco Wholesale Corp., 49 F.3d 550, 552 (9th Cir.), cert. denied, 116 S. Ct. 276 (1995).

In the present case, the Plan provides:

> The Plan Administrator shall have full power and authority to determine all matters arising in the administration, interpretation and application of the Plan, not inconsistent with the provisions of applicable law, and its interpretation and decisions with respect thereto shall be final and conclusive ...

Ficalora argues that the district court erred when it applied an abuse of discretion standard of review because: (1) the Plan did not give the Plan Administrator the discretion to make benefits decisions, and (2) the Plan

Administrator's decision to deny benefits was influenced by a conflict of interest.

We disagree with both of Ficalora's arguments. We have repeatedly held that language similar to the language in IBM's Plan gives plan administrators the discretionary authority to determine eligibility for benefits. See, e.g., Canseco v. Construction Laborers Pension Trust for Southern California, 93 F.3d 600, 605 (9th Cir. 1996), cert. denied, 117 S. Ct. 1250 (1997) (trustee of plan "shall have the power to administer" the plan, including the power "to construe the provisions of the ... Plan" and "any such construction adopted in . . . good faith shall be binding"); Patterson v. Hughes Aircraft Co., 11 F.3d 948, 949 n.1 (9th Cir. 1993) (the plan administrator will issue a "written decision of approval or denial" including, in the event of denial a "clear reference to the Plan provisions upon which the denial is based."); Jones v. Laborers Health & Welfare Trust Fund, 906 F.2d 480, 481 (9th Cir. 1990) (trustees shall have power "to construe the provisions of this Trust Agreement and the Plan, and any such construction adopted by the [trustees] in good faith shall be binding"); Madden v. ITT Long Term Disability Plan for Salaried Employees, 914 F.2d 1279, 1284 (9th Cir. 1990) (the Administration Committee "shall have the exclusive right . . . to interpret the Plan and to decide any and all matters arising hereunder, including the right to remedy possible

ambiguities, equities, inconsistencies, or omissions . . . [and] all interpretations and decisions of the . . . Administration Committee . . . with respect to any matter hereunder shall be final, conclusive and binding on all parties affected thereby.").

Under our precedent, the Plan Administrator's decision to deny Ficalora benefits is not subject to de novo review because it was not influenced by a conflict of interest. The parties do not dispute that a conflict of interest exists: IBM both employs the Plan Administrator and pays, either directly or through a fund, any benefits administered pursuant to the Plan.

To determine if a Plan Administrator's decision is entitled to a less deferential standard of review because of such a conflict, we employ a two-stage inquiry. Atwood v. Newmont Gold Co., 45 F.3d 1317, 1323 (9th Cir. 1995). In the first stage, we "must determine whether the affected beneficiary has provided material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the beneficiary." Id. Assuming that the beneficiary successfully satisfies this burden, in the second stage, "the plan bears the burden of producing evidence to show that the conflict of interest did not affect the decision to deny benefits." Id. If the plan

does not carry that burden, we must review de novo the plan administrator's denial of benefits. Id.

Ficalora satisfied his burden in the first stage of this inquiry by pointing to a statement made by James J. Sinnott while he was the Plan Administrator considering Ficalora's request for benefits. According to Ficalora, Sinnott stated: "we are not going to pay you for the rest of your life."

Nevertheless, the district court was correct in applying an abuse of discretion standard of review, because IBM satisfied its burden, in the second stage, of "producing evidence to show that the conflict of interest did not affect the decision to deny benefits." Atwood, 45 F.3d at 1323. The plan administrator ultimately responsible for denying Ficalora benefits was Michael A. Tarre, not Sinnott. And, nothing in the record indicates that Tarre was influenced by a conflict of interest.

We conclude that the district court properly applied an abuse of discretion standard of review.

II

DENIAL OF BENEFITS

An ERISA plan administrator such as Tarre abuses his discretion if he "relies on clearly erroneous findings of fact in making benefits determinations. Taft v. Equitable Life Assur. Soc., 9 F.3d 1469, 1473 (9th Cir. 1993) ; see also Atwood, 45 F.3d at 1323-24. Ficalora argues that

Tarre relied on a clearly erroneous finding of fact in making the benefits denial decision--Tarre's finding that Ficalora did not prove that MS prevented him from "the taking of any employment for pay or profit."[1]

IBM concedes that Ficalora adequately demonstrated he suffered from MS. Based on the evidence available to him at the time he made his decision, however, Plan Administrator Tarre did not clearly err in finding that Ficalora did not demonstrate that MS precluded Ficalora from engaging in any gainful employment. Dr. Swanson, the IBM physician who examined Ficalora, stated that Ficalora had "no clear physical limitation" that would prevent him from working, and nothing in the record establishes that Ficalora was completely disabled from working. Given this state of the record, Tarre did not clearly err in finding that Ficalora failed to prove he was incapable of performing any work for pay or profit.

---

[1]The Plan provides:

> An employee will be considered disabled by giving satisfactory proof to IBM that a disability from any cause prevents the taking of any employment for pay or profit.

III

EXTENT OF THE ADMINISTRATIVE RECORD

After Tarre completed his final review of Ficalora's application, he offered to perform an additional review to consider additional evidence, provided that Ficalora satisfied several conditions. When Ficalora failed to satisfy those conditions, Tarre refused to perform the additional review. Ficalora contends that his administrative record closed on February 14, 1994, the date when Tarre informed him that he would not be performing the additional review. See Taft, 9 F.3d at 1472 (holding that, to determine whether the Plan Administrator abused its discretion, a court of appeals may only review the evidence that was presented to the Plan Administrator as part of Ficalora's administrative record). In contrast, IBM argues that the administrative record closed on January 21, 1993, the date when Tarre issued his final denial of Ficalora's benefits request. Because the facts are not in dispute, only the contentions, we may resolve as a matter of law the issue of when the administrative record closed.

In our view, even assuming Tarre had the authority to offer to conduct an additional review, Tarre was only required to perform the review if he and Ficalora reached an agreement. Both the Plan and ERISA are silent as to how to interpret an offer of additional review by a Plan Administrator. However, "[i]t is well settled that when

ERISA is silent on an issue, [a court] may turn to state law to fashion the appropriate federal common-law rule." Hotel Employees & Restaurant Employees International Union Welfare Fund, 50 F.3d 719, 721 (1995); see also Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 386 (9th Cir. 1994). To determine whether the correspondence between Ficalora and Tarre ultimately resulted in an agreement that required Tarre to conduct an additional review, we therefore turn to traditional principles of contract law.

On August 20, 1993, Tarre offered to conduct an additional review, provided that Ficalora agreed to certain conditions. Ficalora accepted the offer on September 17, but conditioned his acceptance on several matters. Under settled principles of contract law, Ficalora's September 17 letter was a counteroffer, not an acceptance, because it imposed additional conditions. See Rorvig v. Douglas, 123 Wash.2d 854, 858 (1994) ("It is a basic rule of contract formation that an expression of assent that changes the terms of the offer in any material respect may be operative as a counteroffer; but it is not an acceptance and consummates no contract."); Strassburg v. Ricotta, 480 N.Y.S.2d 649, 650 (1984) ("under ordinary principles of contract law, a purchaser who has not yet subscribed [to] an agreement rejects it by the making of either a conditional acceptance or a counter offer."); Ardente v.

Horan, 117 R.I. 254, 259-60 (1976) ("An acceptance which is equivocal or upon condition or with a limitation is a counteroffer and requires acceptance by the original offeror before a contractual relationship can exist."); Landberg v. Landberg, 24 Cal. App. 3d 742, 750 (1972) ("qualified acceptance constitutes a rejection terminating the offer; it is a new proposal or counteroffer which must be accepted by the former offeror now turned offeree before a binding contract results.").

In response to Ficalora's counteroffer, Tarre wrote a letter dated November 15, 1993, in which he stated that IBM would be unable to meet one of Ficalora's conditions. Tarre also reworded Ficalora's other conditions, and asked whether Ficalora would still accept. For the same reason that Ficalora's September 17 letter was a counteroffer (it modified the terms of the offer by imposing additional conditions), Tarre's November 15 letter was a counteroffer as well.

In a letter dated November 19, 1993, Ficalora responded to Tarre's counteroffer with another counteroffer. In his letter of February 14, 1994, Tarre expressly rejected Ficalora's final counteroffer. Thus, Tarre and Ficalora never reached an agreement requiring Tarre to conduct an additional review. We conclude, therefore, that the administrative record closed on January 21, 1993, the date IBM finally rejected Ficalora's application for benefits.

Ficalora v. International Business Machines Corporation, No. 96-35229

PREGERSON, Circuit Judge, dissenting:

I dissent. The majority fails adequately to consider the critical issue facing us in this case: Was there "satisfactory proof to IBM that a disability from any cause prevented [Ficalora from] the taking of any employment for pay or profit?"[1] It is undisputed that Ficalora suffered from a severe case of multiple sclerosis ("MS"), a devastating physical illness.[2] It is also undisputed that the Social Security Administration considered Ficalora disabled and awarded him disability benefits and that several medical doctors documented the severe effects that MS had on Ficalora's health. I submit that the Plan Administrator

---

[1]This is the standard Ficalora had to meet to be eligible for benefits under the IBM Medical Disability Income Plan.

[2]Multiple sclerosis is a disorder of the nervous system for which there is no known cure. Hughes v. Boston Mutual Life Ins. Co., 26 F.3d 264, 266 (1st Cir. 1994). Symptoms include weakness, fatigue, loss of coordination, depression, and stiffness or weakness in the lower extremities. Id. Fatigue "commonly occurs as the principal presenting symptom of the disease and is a frequent cause for unemployment in MS patients." Weinshenker, et al., A Double-Blind, Randomized Crossover Trial of Pemoline in Fatigue Associated with Multiple-Sclerosis, 1648 Neurology 42, August 1992.

abused his discretion in failing to conclude that Ficalora presented "satisfactory proof" that his chronic MS prevents him from taking any employment for pay or profit.

I

Before describing the evidence before the Plan Administrator, it is important to understand how IBM employees might qualify for disability benefits under the IBM Medical Disability Income Plan ("Disability Plan"). An employee is deemed medically disabled when he or she can meet the following test: "An employee will be considered disabled by giving satisfactory proof to IBM that a disability from any cause prevents the taking of any employment for pay or profit."

To apply for benefits under the Disability Plan, an applicant must submit an application to the IBM medical department. Two IBM officials, the Area Managing Physician and the Area Personnel Manager, prepare the applicant's application for disability benefits. Sometimes the Area Managing Physician arranges for the applicant to be evaluated by medical consultants selected by IBM. After taking all these steps, the Area Managing Physician assembles the administrative record[3] that will be considered

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[3]The administrative record consists of the application; the IBM medical file; the Area Managing Physician's written summary of the application, recommendation, and supporting medical documentation;

in deciding whether to grant the applicant's request for disability benefits.

The administrative record is forwarded to an IBM official called the Medical Director, who could approve the application or forward the administrative record to the Disability Plan Panel. The Disability Plan panel then makes a recommendation to the Plan Administrator whether to grant disability benefits under the Plan to the applicant. The Plan Administrator is ultimately responsible for issuing a benefits decision.

An employee may request review of a benefits denial by the Plan Administrator. The Plan Administrator is then required to issue a notice describing the result of his review within 60 days of the request for review.

II

In March 1980, IBM employed Ficalora as a supply room clerk. Over the course of several years, Ficalora was promoted to increasingly more responsible positions until he became an Accounts Systems Engineer. In December 1988, while still employed by IBM, Ficalora experienced pain and loss of vision in his right eye. Ficalora consulted

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reports from the applicant's physicians; reports from IBM consultants; the applicant's last three performance appraisals; the applicant's work history and profile; and any other relevant documents.

an optometrist, who referred him to a neurologist because of the possibility that Ficalora might suffer from MS.

Over the next few years, Ficalora's vision improved. By May, 1991, however, Ficalora developed other symptoms:

> [Ficalora] developed a band of numbness around his body at the level of the umbilicus which spread to the genitalia and legs and feet. Then shortly after he was nauseated, developed urgency and frequency, fatiguability and problems with his memory.

In June 1991, Ficalora went to see Dr. Roy L. Swank of the Swank Multiple Sclerosis Clinic of Oregon Health Sciences University, who diagnosed him with MS. Dr. Swank "recommended to [Ficalora] that he apply for retirement."

Ficalora began to miss work frequently. On June 18, 1991, Ficalora wrote to Austin Blood, an IBM Branch Manager, to request Disability Plan benefits. In response to Ficalora's request for benefits under the Disability Plan, on June 26, 1991, Dr. Charles Grose, IBM's Western Area Medical Director, wrote a letter asking Dr. Swank for a "summary of [his] evaluation of [Ficalora], including [his] diagnosis, the extent of [Ficalora's] disability, recommended treatment, and prognosis." On July 9, 1991, after examining Ficalora, Dr. Swank wrote:

> [Ficalora] is very sensitive to stress, as are all M.S. patients, and in his case, memory and clarity of

> thought are inclined to suffer. Considering the type of work [he] does, I do not believe he will be able to continue to do satisfactory work. However, he might be able to carry on at half-time, and that would perhaps be better for [him] as a first step towards retirement.

Starting in August, 1991, Ficalora tried to work half days, three days a week, and was reassigned by his manager to a position that involved less customer interaction. However, Ficalora's new job proved to be very stressful, and he began to experience exacerbated fatigue, burning in his feet, dizziness, nausea, and head and leg aches.

On October 4, 1991, Ficalora was examined by Dr. Philip Swanson, an IBM-selected neurologist at the University of Washington Medical Center.[4] In his report, dated October 23, 1991, Dr. Swanson stated:

> [W]e do not have firm, solid evidence that MS is the diagnosis, though I have no reason to doubt that in view of the other sensory symptoms that he has had, from time to time. I, therefore, think it is more probable than not that MS is, indeed the correct diagnosis.

Meanwhile, because of Ficalora's fatigue, he continued to he unable to perform his job. Ficalora's supervisor informed him that he should discontinue work

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[4]Dr. Swanson also reviewed Ficalora's medical record, and the evaluations of Drs. Almaraz and Swank.

pending review of his eligibility for benefits under the Disability Plan.

In a phone conversation between Dr. Swank and an IBM doctor, Dr. Swank stated that Ficalora could only work a few hours per day, and expressed the opinion that Ficalora was "disabled now [and] in the foreseeable future."

IBM then selected another doctor, a psychiatrist named Dr. Jason McLurg, to examine Ficalora. IBM did not ask Dr. McLurg to evaluate whether Ficalora could take any employment for pay or profit, the standard under the Disability Plan. Rather, IBM requested that Dr. McLurg's report contain an evaluation of whether there was a psychiatric component to Ficalora's fatigue, as well as any recommendations for treatment. After examining Ficalora, Dr. McLurg stated that Ficalora had a "probable diagnosis of a devastating physical disorder, multiple sclerosis," and observed that Ficalora was not taking the diagnosis of MS "laying down," but rather, "was trying to get the most out of his life and to treat his body in the best way possible to minimize the effects of the disease." Dr. McLurg recommended an MRI scan to confirm the diagnosis of MS, and a trial of Prozac "to see if Ficalora's energy or endurance could be improved."

In March 1992, Dr. Grose and Dr. Steven Redmond (IBM's Western Area Medical Director and Western

Region Managing Physician, respectively) forwarded Ficalora's application to IBM's United States Medical Director, Dr. Arnold J. Kaminer. Drs. Grose and Redmond did not examine Ficalora. Rather, upon reviewing his medical records, the doctors recommended that Ficalora's application for benefits be denied, primarily because there was not "sufficient objective evidence that [Ficalora] is disabled." The United States Medical Director also recommended that Ficalora's request be denied. These recommendations and the administrative record were forwarded to the Disability Plan panel.

On May 20, 1992, the Disability Plan panel rejected Ficalora's application because "the medical evidence does not support a disabling condition." Sometime later, the Plan Administrator decided to deny Ficalora benefits.

Meanwhile, on May 17, 1992, the Social Security Administration advised Ficalora that he was considered disabled by MS as of June 1, 1991, and awarded him disability benefits. The Social Security Administration disability examiner found Ficalora "incapable of performing any past relevant work," and "restricted by his residual functional capacity to less than sedentary work.,,

On June 12, 1992, Ficalora received IBM's formal letter denying him benefits. The letter stated the following two reasons for the denial, among others:

The evidence in your case was insufficient to prove disability and a cause of disability to the satisfaction of IBM because:

(a) it did not include objective medical evidence sufficient to definitively establish the presence of a specific disease entity of a type which can be totally disabling.

. . .

(b) it did not include objective medical evidence of impairment sufficiently severe as to make you incapable of taking any employment for pay or profit . . . . (We note in passing that, even if you do have multiple sclerosis, this does not necessarily make you unable to work, as in some cases multiple sclerosis takes a relatively mild course.)

. . .

You have complained of symptoms such as fatigue, head pains, nausea, joint aches, intermittent numbness, and frequency of urination. However, IBM does not consider symptom reports to be satisfactory evidence of disability unless accompanied by objective medical evidence of an underlying medical condition that would account for the reported symptoms to be disabling in degree. The sufficient objective medical evidence presented thus far in your case was not sufficient to support the claimed symptoms and a disabling degree of severity.

On June 19, 1992. Ficalora decided to undergo a Magnetic Resonance Imaging (MRI) scan.[5] The scan revealed "extensive bilateral demyelinating plaque disease."

On August 3, 1992, Ficalora underwent an examination by Dr. Richard Blanck, a neurologist. Dr. Blanck diagnosed Ficalora with MS, and observed the following:

> His symptoms and signs include burning paresthesias in his feet, lower extremity spasticity, walking difficulty secondary to generalized weakness and easy fatigability and visual difficulty. MS is a chronic, progressive neurologic disorder. His prognosis is guarded and the patient's physical limitations are permanent from a medical standpoint.

On August 7, 1992, Ficalora requested the Plan Administrator to review the denial of his claim for disability benefits. Ficalora sent new evidence in support of his request for review, including his MRI and Dr. Blanck's August 3, 1992, report. Ficalora also sent to the Plan Administrator an August 18, 1992, report authored by Dr. Blanck, that confirmed Ficalora's problems of "generalized weakness and easy fatigueability, walking difficulty

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[5]MRI scans are the "most valuable investigative tool in diagnosing MS." David H. Miller, M.D., Magnetic Resonance Imaging in the Diagnosis of Multiple Sclerosis In an MRI scan of a person with MS, white matter lesions or plaques are present in parts of the brain.

because of lower extremity weakness, burning in his feet and spasms that occur intermittently involving the left leg."

In response, the Plan Administrator asked Ficalora on August 28, 1992, to authorize the release of medical records from Dr. Blanck and the Social Security Administration. Ficalora complied with this request.

In the August 28, 1992, letter, the Plan Administrator also asked Ficalora to "undergo a complete neurological assessment by a consultant chosen by IBM, which may include formal testing of cognitive function." Ficalora's attorney refused this request and gave the following reason:

> [S]uch an examination is unnecessary given the ample medical evidence already in the file establishing disability. Mr. Ficalora has previously been examined by two (2) IBM chosen and paid medical consultants with respect to this claim.
>
> . . .
>
> In addition to these two (2) reports by IBM paid medical consultants, you also have reports in your file from Drs. Swank, Blanck, Kornmesser, Stanfield, and Almarez. All of these reports support either Mr. Ficalora's symptomology, diagnosis of Multiple Sclerosis or prognosis and degree of disability.

On November 18, 1992, the Disability Plan panel again reviewed Ficalora's file and recommended that benefits be denied. The notice of denial stated the

following to Ficalora: "In your case, although you have a medical condition, you have not complied with our repeated requests for complete medical information sufficient to enable us to resolve the issues posed in [the June 12, 1992 notice]."

The Plan Administrator reviewed Ficalora's file and the recommendation of the Disability Plan panel, and decided to deny Ficalora benefits because Ficalora's "records contained insufficient objective medical evidence of [Ficalora's] inability to work."

Before the Plan Administrator could issue a notice to Ficalora, records from the Social Security Administration arrived at IBM, along with an updated letter from Dr. Blanck dated November 3, 1992. Dr. Blanck's letter stated that Ficalora's symptoms "have been chronic and slowly progressive." The Disability Plan panel met again on December 18, 1992, reconsidered Ficalora's file with this additional evidence, and yet again recommended a denial of benefits. The Plan Administrator again agreed with the Disability Plan panel. On January 21, 1993, the Plan Administrator issued a final denial of benefits letter, which stated that Ficalora did not present "satisfactory proof . . . that a disability . . . prevents the taking of any employment for pay or profit."

III

The majority states that the Plan Administrator did not clearly err in finding that Ficalora did not prove that multiple sclerosis prevented him from "the taking of any employment for pay or profit." In support of this assertion, the majority points to a single handwritten note by an IBM physician, Dr. Swanson, that Ficalora has "no clear physical limitation." Dr. Swanson based this opinion on his October 4, 1991, evaluation of Ficalora.

Dr. Swanson's handwritten note does not necessarily indicate that Ficalora had the ability to take any employment for pay or profit. It only states that Ficalora has no "clear" limitation. Thus, Dr. Swanson left open the possibility that a condition that was difficult to diagnose might account for Ficalora's claimed inability to take employment for pay or profit. In the present case, the medical doctors did not conclusively establish that Ficalora had MS until well after Swanson's October 4, 1991, examination of Ficalora.

Even assuming that Dr. Swanson's handwritten note does evidence his conclusion that Ficalora could take employment for pay or profit, that conclusion is contradicted by significant evidence that existed on October 4, 1991. For instance, Dr. Swank recommended in June 1991, "that [Ficalora] apply for retirement." Dr. Swank also stated the following on July 9, 1991: "Considering the

type of work [Ficalora] does, I do not believe he will be able to continue to do satisfactory work. However, he might be able to carry on at half-time, and that would perhaps be better for [him] as a first step towards retirement." Ficalora's attempt to work in a low-stress job for half-days, three days a week, however, ended in failure because exacerbated fatigue, burning in his feet, dizziness, nausea, and head and leg aches, prevented Ficalora from working.

Furthermore, it is undisputed that Ficalora suffered from a chronic form of MS that worsened over time.[6] If Ficalora's MS did not render him unable to take employment for pay or profit in October 4, 1991, it may have made him unable to take employment for pay or profit by early 1993, when Ficalora's application for benefits was considered. Thus, the important question before the Disability Panel and Plan Administrator was whether

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[6]A report by the U.S. Department of Health and Human Services about MS identifies two kinds of the disease: (1) exacerbating-remitting disease, characterized by "[p]eriods of deteriorating ability..... followed by periods of recovery;" and (2) chronic progressive disease, which has a "steady downhill course." Multiple Sclerosis--Medicine for the Public, (United States Department of Health and Human Services, Public Health Service, National Institutes of Health, and Warren Grant Magnuson Clinical Center), Aug. 1990, at section entitled "Symptoms."

Ficalora presented satisfactory proof of eligibility under the Disability Plan in early 1993.

Ficalora presented substantial evidence that he could not take employment for pay or profit in early 1993. First, the Social Security Administration decided on May 17, 1992, to consider Ficalora disabled by MS as of June 1, 1991, and to award him disability benefits. Second, the Social Security disability examiner found that Ficalora was "incapable of performing any past relevant work," and was "restricted by his residual functional capacity to less than sedentary work." Third, Ficalora's MRI revealed "extensive bilateral demyeliniating plaque disease." Fourth, Dr. Blanck stated in a November 3, 1992, letter the following: "[Ficalora's] symptoms have been chronic and slowly progressive. The course of MS is impossible to predict but the chronic progressive course speaks for a poor prognosis."

In my view, Dr. Swanson's brief, handwritten comment is not sufficient to support the Plan Administrator's decision to deny disability benefits to Ficalora. Nor do I see any other evidence that would support the Plan Administrator's decision. If this is the only evidence in support of the position of the Plan Administrator, I submit that he abused his discretion by denying Ficalora benefits under the Disability Plan.

I also believe that the majority places too onerous a burden of proof on Ficalora. He is not required to rebut every scintilla of evidence that might suggest he could do some small amount of work for a short period of time. The Plan Administrator abused his discretion because under any view of the evidence, Ficalora presented satisfactory proof to IBM that his MS prevented him from taking any employment for pay or profit.[7] I would reverse the district court's opinion affirming the Plan Administrator's decision.[8]

IV

It is undisputed that the Social Security Administration considers Ficalora disabled and entitled to

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[7]In hindsight, it is clear that Ficalora is eligible for benefits under the Disability Plan. On March 5, 1993, Ficalora voluntarily went to Dr. Swanson, the IBM neurologist, for another examination. This time, Dr. Swanson recommended that Ficalora seek retirement from his job at IBM. In May 1993, Dr. Swank reexamined Ficalora, and stated that Ficalora was "at present totally disabled for any type of gainful employment."

[8]Because I come to this conclusion, it is unnecessary to address the two issues that the majority chooses to resolve it its disposition: (1) whether the language of the Disability Plan places discretion in the hands of the Plan Administrator, meaning that the panel can only review the Plan Administrator's decision for an abuse of discretion; and (2) whether the Plan Administrator was required to consider evidence that Ficalora submitted for consideration after the Plan Administrator denied Ficalora disability benefits upon reconsideration.

benefits because he is unable to do even sedentary work. Several doctors have told Ficalora that he should retire. One of IBM's doctors concluded that Ficalora is "totally disabled for any type of gainful employment," although this last bit of evidence may have arrived late in the day. Even without that last bit of evidence, it is clear that Ficalora presented more than "satisfactory proof" that he could not take any employment for pay or profit due to his chronic, worsening MS.

In my view, this case is an example of a corporate bureaucracy disregarding the pain and suffering of its disabled employees. One might also conclude that Ficalora fell victim to an uncaring review scheme that places the "bottom line" above the interests of loyal, disabled employees. Ficalora is just such an employee, suffering the ravages of a chronic form of MS, who is denied the means to live his life with dignity. Regardless of how one views this case, it represents the shameful mistreatment of an employee forced to simultaneously battle MS and IBM.

Accordingly, I would reverse the district court and find that the Plan Administrator abused his discretion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT A. FICALORA, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES, INC., a Delaware corporation licensed to conduct business in Washington; and J.J. SINNOT, IBM Plan Administrator. Defendants.	CASE NO. C95-5342RJB ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; ORDER DENYING PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on Defendants' Motion for Summary Judgment and on Plaintiff's Cross Motion for Summary Judgment. The court has considered all pleadings filed in support of and in opposition to the motions and the file herein.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issue of material fact. T.W. Elec.

Service v. Pacific Contractors, 809 F.2d 626 (9th Cir. 1987); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). A motion for summary judgment must be granted against the nonmoving party who fails to prove an essential element of the claim. A genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T.W. Elec. Service, 809 F.2d at 630 (citations omitted).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial. Anderson, 477 U.S. at 2554. The non moving party must present specific, significant probative evidence, showing factual issues for trial, not simply "some metaphysical doubt." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); T.W. Elec. Service, 809 F.2d at 630, 632. In Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990), the U.S. Supreme Court stated that a District Court must resolve any factual issues of controversy in favor of the non-moving party only when the facts specifically attested by

that party contradict facts specifically attested by the moving party. Conclusory, nonspecific statements in affidavits are generally not sufficient. The court further held that "missing facts" will not be "presumed". Id. at 889.

FACTUAL BACKGROUND

The factual background of this case is complex and detailed. The court will present a brief summarization here:

Plaintiff was employed by Defendant International Business Machines, Inc. ("IBM") in March 1980. In October, 1988, he reported symptoms of pain and loss of vision in his right eye. At first, he was tentatively diagnosed as having optic neuritis. Although his vision improved, he continued to experience other symptoms, such as fatigue, weak and sore limbs, numbness and memory loss. A neurological examination showed the possibility that plaintiff suffered from Multiple Sclerosis ("MS"). Because plaintiff was satisfied with that diagnosis, he was not willing to undergo various medical tests to pinpoint the diagnosis.

In May, 1991, plaintiff stopped working and further medical examination supported the MS diagnosis. In June, 1991, plaintiff began processing his application for benefits

pursuant to IBM's Medical Disability Income Plan ("MDIP"). His application was considered, medical evaluations were conducted to determine if plaintiff met the criteria for disability under the MDIP, and volumes of correspondence accumulated between the parties and their various representatives. A portion of that correspondence pertained to plaintiff's reluctance to submit to medical testing and examination to support and enhance the documentation supporting his application. Plaintiff also restricted communication between his treating medical professionals and IBM's employees. The final result was that plaintiff's application was finally denied on January 21, 1993.

The plaintiff has brought this action, seeking reversal of the denial and damages resulting from allegations of breach of fiduciary duties of the MDIP administrators. IBM maintains that plaintiff never met the specific criteria for disability established in the MDIP and has not been cooperative in presenting the necessary supporting evidence of disability.

ISSUES

The primary issue presented in these motions is whether the MDIP Administrator abused his discretion by

denying plaintiff's disability benefits under the terms of the MDIP.

DISCUSSION

IBM contends that plaintiff failed to provide the necessary proof that he was disabled from taking any employment. IBM argues that the Plan Administrator's decision to deny plaintiff's application was reasonable and within his exercise of discretion allowed under the MDIP.

Plaintiff contends that he did provide the necessary objective medical evidence of both a medical disability and a disability which prevented him from taking any employment. He argues that his medical records were sufficient and that obtaining Social Security disability benefits proved that he was unable to engage in any gainful employment. He also contends that the Plan Administrator breached his fiduciary duty, under the MDIP, to grant his application.

The IBM MDIP Administrative Guide grants the Plan Administrator wide authority.

> The Plan Administrator has a wide scope of discretion with respect to the Plan, and its operation, having full power and authority to determine all matters arising in the administration, application and interpretation of the Plan (not inconsistent with the provisions of applicable law), including the

power to make final and conclusive decisions and interpretations.

Declaration of Andrea Epps, Ex. A. p. 153; Declaration of Michael A. Tarre. Eligibility for disability benefits under IBM's MDIP requires the following showing:

> 1. An employee will be considered disabled by giving satisfactory proof to IBM that a disability from any cause prevents the taking of any employment for pay or profit. Disability must have existed for at least nine months and be such that it presumably will continue during the employee's lifetime.
>
> 2. [T]he disability must be a <u>medical</u> disability ... there must be medical proof of a medical cause. Proof will not be deemed satisfactory without objective medical findings which substantiate a specific disease entity (physical or mental) as being the underlying cause of the disability. . . . Symptoms are not in themselves an acceptable substitute for objective medical findings, nor will a syndrome without significant objective findings be considered a diagnosis of a specific disease entity. There must be clinically-detected abnormalities in the individual, recognized as sufficient to account for functional impairment which presumably will last for the rest of the individual's life and which is severe enough to disable the individual from all gainful employment.

Declaration of Andrea Epps, Ex. A, p. 154-5; Declaration of Michael A. Tarre.

Where a plan grants the administrator with authority to determine whether an applicant is eligible for benefits under the terms of the plan, the district court may review the administrative decision for abuse of discretion. Atwood v. Newmont Gold Co., 45 F.3d 1317, 1321 (9th Cir. 1995); Taft v. Equitable Life Issur. Soc., 9 F.3d 1469, 1471 (9th Cir. 1993). This standard allows the court to "'review only the evidence presented to the [plan] trustees.'" Taft, 9 F.3d at 1471 (internal citations omitted). In applying this standard to administrative decisions under benefits plans, the court should determine if the decision was rendered "'without any explanation, or construe[d] provisions of the plan in a way that conflicts with the plain language of the plan,'" or "relies on clearly erroneous findings of fact in making benefit determinations," or the decision is "'so patently arbitrary and unreasonable as to lack foundation in factual basis.'" Id. at 1472-73 (internal citations omitted). Decisions that are contrary to evidence in the record do not necessarily amount to an abuse of discretion, nor is a previous grant of Social Security benefits conclusive. Id. at 1473-74 (internal citations omitted).

Plaintiff argues that the court should conduct a de novo review of the Plan Administrator's decision because he alleges that the denial of his application amounts to a breach of fiduciary duty, arising from an apparent conflict between the Plan Administrator's self interest in preserving plan assets and his obligation to the plaintiff beneficiary. He relies on Atwood, supra. As required by the Atwood decision, the plaintiff must show "material, probative evidence beyond the apparent conflict" which shows the breach of duty. Atwood, 45 F.3d at 1323. Other than his allegations, he has not produced "specific, significant probative evidence, showing factual issues for trial. . . ." Matsushita Elec. Indus. Co., 475 U.S. at 586. Therefore, the court will review the Plan Administrator's decision for abuse of discretion.

The court has carefully reviewed the MDIP record produced by IBM. See, Declaration of Andrea Epps, Ex. A. The court particularly reviewed the medical reports for evidence pertaining to plaintiff's ability to be employed. See, Ex. A, pp. 5, 18, 19, 20, 21, 23, 59-61, 62-63, 64, 65-67, 218-27, 244, 245, 246-48, 250-57. Of all those medical records only two mentioned plaintiff's ability to work. On July 9, 1991, Dr. Roy L. Swank stated that "[c]onsidering the type of work Bob does, I do not believe

he will be able to continue to do satisfactory work. However, he might be able to carry on at half-time, and that would perhaps be better for the patient as a first step toward retirement." Ex. A, p. 245. On December 4, 1991, Dr. Swank stated, "At that time [August 28, 1991] I advised him to stop work . . . I have recommended to the patient that he apply for retirement." Ex. A., p. 64. The other evidence of plaintiff's ability to work comes from the determination of the Social Security Administration to grant him disability benefits.

In applying the abuse of discretion standard, as established by the Ninth Circuit, the court cannot find that the decision of IBM Plan Administrator was based on clearly erroneous factual findings, was beyond the power and authority set forth in the MDIP, or conflicts with the plain language of the MDIP. The records are replete with plaintiff's reluctance to take medication which might relieve some of his symptoms, and refusal to present himself for further examination. Although the court is sympathetic with plaintiff's desire to avoid repeated examinations, the nature of MS requires continued treatment and monitoring by medical professionals. If plaintiff wishes to receive disability benefits from IBM, he should present the required medical evidence which shows

his inability to be employed for pay or profit. In sum, no factual issues are presented for trial and the defendants' motion for summary judgment should be granted. This decision should not prejudice plaintiff from renewing his application for benefits under MDIP, if appropriate. Plaintiff's claims against the defendants should be dismissed.

Because of this determination, the remaining issues raised by the plaintiff are moot and will not be discussed here.

For the above stated reasons, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is **GRANTED**. Plaintiff's claims are **DISMISSED**.

It is further

ORDERED that Plaintiff's Cross Motion for Summary Judgment is **DENIED**.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 24th day of January, 1996.

Robert J. Bryan
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. FICALORA,	) No. 96-35229
Plaintiff-Appellant,	)
	) D.C. No. CV-95-05342-RJB
v.	)
INTERNATIONAL BUSINESS MACHINES CORPORATION, a Delaware corporation licensed to conduct business in Washington; J. J. SINNOTT, IBM Plan Administrator; INTERNATIONAL BUSINESS MACHINES, INC., MEDICAL DISABILITY INCOME PLAN; CHASE MANHATTAN BANK, Trustee of MDIP; MICHAEL A. TARRE, MDIP Administrator; ARNOLD J. KAMINER; CHARLES D. GROSE, M.D.; STEVE REDMOND, M.D.; W.R. MATSON; D. A. PEGUERO; T.L. RICHARDS; D. B. ROBBINS, M.D.	) ORDER
Defendants-Appellees.	)

Before: WRIGHT, PREGERSON and THOMPSON, Circuit Judges.

Judges Wright and Thompson have voted to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc, and Judge Wright so recommends. Judge Pregerson has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on that suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Supreme Court, U.S.
FILED
MAR 5 1998
CLERK

(2)

No. 97-1269

In The

Supreme Court of the United States

October Term, 1997

ROBERT FICALORA,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP. & J. J. SINNOTT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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17 pp

QUESTION PRESENTED

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), this Court stated that if an ERISA benefit plan "gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts § 187, Comment d (1959)." The question presented is:

> Whether, where an ERISA benefit plan gives the administrator discretion to determine eligibility for benefits, a court properly reviews the plan administrator's decision to deny benefits under an abuse of discretion standard, where the plan administrator produces evidence showing that a conflict of interest did not affect the decision to deny benefits.

STATEMENT PURSUANT TO RULE 29.6

The following is an affiliate or nonwholly owned subsidiary of respondent International Business Machines Corporation ("IBM"): Object Design, Inc. We have defined "affiliate" for purposes of this statement as companies in which IBM holds an interest of ten percent or greater of outstanding securities.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

STATUTES INVOLVED 1

I. STATEMENT OF THE CASE 2

A. INTRODUCTION 2

B. THE MEDICAL DISABILITY INCOME PLAN 2

C. FICALORA'S APPLICATION FOR PLAN BENEFITS 3

II. REASONS FOR DENYING THE PETITION 7

A. THE DIFFERENCE IN APPROACHES USED BY FEDERAL COURTS IN WEIGHING A FIDUCIARY'S CONFLICT OF INTEREST IS NOT A MATTER OF SIGNIFICANT IMPORTANCE JUSTIFYING REVIEW 7

B. REVIEW BY THIS COURT AT THIS TIME IS PREMATURE 10

C. THIS CASE DOES NOT PRESENT CLEARLY THE ISSUE OF WHETHER A PARTICULAR APPROACH IS PREFERRED WHEN WEIGHING A CONFLICT OF INTEREST 11

III. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263 (8th Cir. 1997) (Beam, J., dissenting) 10

Atwood v. Newmont Gold Co., 45 F.3d 1317 (9th Cir. 1995) 10

Best v. Nissan Motor Corp., 973 F. Supp. 770 (M.D. Tenn. 1997) 10

Brown v. Blue Cross & Blue Shield of Ala., Inc., 898 F.2d 1556 (11th Cir. 1990) 7, 8, 9

Chambers v. Family Health Plan Corp., 100 F.3d 818 (10th Cir. 1996) 8

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 7, 10

Jones v. Sonat, Inc., 997 F.2d 113 (5th Cir. 1993) 9

McCray v. New York, 461 U.S. 961 (1983) 11

Palmer v. University Medical Group, 973 F. Supp. 1179 (D. Or. 1997) 11

Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469 (9th Cir. 1993) 9

Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1987) 8, 9

Wildbur v. Arco Chem. Co., 974 F.2d 631 (5th Cir. 1992) 8, 9

STATUTES

29 U.S.C. § 1104(a)(1)(D) 2

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* 1

No. 97-1269

In The

Supreme Court of the United States

October Term, 1997

ROBERT FICALORA,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP. & J. J. SINNOTT,

Respondents.[1]

STATUTES INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and, in particular, the requirement that an ERISA fiduciary

> shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> . . .

[1] Additional defendants were named in the Amended Complaint, and are included in the caption of the opinion of the Ninth Circuit. However, to the knowledge of respondents IBM and J. J. Sinnott, these additional parties never were served and never have appeared in this action.

> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].

29 U.S.C. § 1104(a)(1)(D).

I. STATEMENT OF THE CASE

A. INTRODUCTION

Ficalora's petition reflects a selective – and often misleading – recitation of the facts. The bottom line is quite simple: Ficalora's application for benefits and appeal were denied because he failed to provide objective medical evidence demonstrating that his disability prevented him from taking any employment, having refused to cooperate with IBM's repeated requests for information to document the existence and extent of his alleged disability.

B. THE MEDICAL DISABILITY INCOME PLAN

The IBM Medical Disability Income Plan (the "Plan") provides benefits to employees who demonstrate that they are "medically disabled." CR 15; ER 107-08, 142.[2] The Plan provides that an applicant is deemed "medically disabled" when there is "satisfactory proof to IBM that a disability from any cause prevented the taking of any

[2] Citations to the factual record below are abbreviated as "CR" for Clerk's Record, "ER" for Excerpts from the Record, and "SER" for Supplemental Excerpts from the Record.

employment for pay or profit. Disability must have existed for at least nine months and be such that it presumably would continue during the employee's lifetime." *Id.* The Plan provides that the Plan Administrator has authority to determine "all matters arising in the administration, application, and interpretation of the Plan." CR 15; ER 105, 142.

C. FICALORA'S APPLICATION FOR PLAN BENEFITS

In October 1988, Ficalora experienced pain and loss of vision in his right eye. A neurological examination by Dr. Lewis Almaraz showed the possibility of multiple sclerosis ("MS"). CR 16; SER 400. Because Ficalora concluded that he had MS, he declined to follow Dr. Almaraz's recommendation that he undergo a magnetic resonance imaging ("MRI") test. CR 44, at 4. In May 1991, Ficalora stopped working at IBM and saw another neurologist, Dr. Roy Swank. CR 16; SER 400. Based on Ficalora's complaints, and without doing an MRI, Dr. Swank diagnosed Ficalora as suffering from MS. CR 16; SER 15.

In June 1991, Ficalora applied for benefits under the Plan. *Id.* Pursuant to Plan provisions, IBM requested an evaluation from Dr. Swank regarding the extent of Ficalora's disability. Dr. Swank responded by saying that Ficalora suffered from MS and corresponding fatigability, but was not so disabled that he could not return to work at IBM. CR 16; SER 42, 401.

In accordance with the Plan, IBM then sent Ficalora to two independent medical examinations in an attempt

to determine Ficalora's eligibility for benefits. CR 16; SER 401. Dr. Philip Swanson, a neurologist at the University of Washington Medical Center, found that MS was a "probable" diagnosis but that Ficalora had "no clear physical limitations." CR 16; SER 56-58, 401. Dr. Jason MacLurg, a psychiatrist, suggested that medication could ameliorate Ficalora's fatigability and recommended an MRI to confirm the MS diagnosis. CR 16; SER 26-28. Again, however, no MRI was done.

In December 1991, Dr. Swank, Ficalora's treating physician, wrote IBM that, based on symptoms Ficalora had experienced in August – almost two months before Ficalora was evaluated by Dr. Swanson – Ficalora was now unable to work at all. CR 16; SER 29, 401.

In May 1992, after unsuccessful attempts to contact Ficalora to seek further evaluation by Dr. Swanson in order to provide additional evidence, a Panel with responsibility under Plan documents for making the initial eligibility decision[3] decided to deny benefits based on its determination that, while Ficalora had provided information as to his subjective complaints,

> (1) he had not produced sufficient objective medical evidence to warrant a definitive diagnosis of MS; and

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[3] The Plan provides that an initial determination of an individual's eligibility or ineligibility for benefits will be made by a Panel with authority delegated by the Plan Administrator. The Panel consists of the United States Medical Directors along with other individuals appointed at the discretion of the Plan Administrator (generally Benefits staff professionals or representatives from line management or Employee Relations). CR 15; ER 142.

> (2) he had not submitted proof of impairment so severe that he was unable to work.

CR 16; SER 185, 403-04. Ficalora was informed in a June 12, 1992 notice that he could seek review of the denial and that he should submit objective medical evidence with respect to these two issues. CR 16, 164-65, 405.

After receipt of the denial notice and the Plan's statement of what additional information would be needed to qualify for benefits, Ficalora did undergo an MRI, which showed that he most likely suffered from MS, and was examined by Dr. Richard Blanck, a neurologist of his choosing. Dr. Blanck diagnosed Ficalora as "probably suffer[ing] with . . . MS based on currently available data." CR 16; SER 85, 151-52, 405-06. Although Dr. Blanck's report addressed the first issue raised in the June 12, 1992 notification (diagnosis of MS), the report did not address whether Ficalora was medically incapable of "taking employment for pay or profit." CR 16; SER 151-52, 406.

With respect to the issue of whether Ficalora was incapable of working, in the period following the initial June 12, 1992 notification, Ficalora

> (1) would not allow a reexamination to determine whether he was "medically disabled" under the Plan, CR 15; ER 145; SER 239;

(2) threatened to personally sue any doctor who contradicted Dr. Swank and released him to return to work;[4] and

(3) refused to sign a release that would have enabled the Plan to contact Dr. Blanck to seek clarification and elaboration of his report, CR 15; ER 146; SER 326-28.

On December 18, 1992, the Panel reviewed and considered Ficalora's additional evidence that established plaintiff had been diagnosed with MS. CR 15; ER 148; SER 133-347. The Panel, nevertheless, recommended denial of Ficalora's appeal because Ficalora had still not produced sufficient objective medical evidence to support any conclusion that, because of his MS, he was unable to work even with appropriate restrictions, limitations and accommodations. *Id.* In fact, Ficalora produced *no new evidence*, simply arguing that because he had already been awarded social security disability benefits, he should be awarded Plan benefits. SER 145.

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[4] In a letter to the Plan Administrator, Ficalora wrote:

> I tell you that I cannot work and that I spent years trying . . . *that Dr. Swank has declared me disabled, therefore cannot be reasonably refuted by another medical professional.* No follow-up examinations can really measure or change these facts. *I will hold personally liable for any further damage any medical professional who approves my return to the workplace* . . . . Although further medical examinations may be useful in confirming the diagnosis of the disease, *I do not recognize their ability to refute Dr. Swank's belief that I am disabled.*

CR 16; SER 180, 405 (emphasis added).

After an independent review of the Panel's recommendation and Ficalora's complete administrative record, the Plan Administrator, Michael Tarre, agreed with the Panel's recommendation and determined that Ficalora was ineligible for benefits under the Plan. CR 15; ER 148. This determination was communicated to Ficalora in a notice dated January 21, 1993. CR 15; ER 148; SER 133-34.

After the Plan Administrator's final denial of Ficalora's application, Ficalora, through his attorney, requested an additional review. SER 411-12. On August 20, 1993, IBM offered voluntarily, but conditionally, to provide additional administrative review, even though such review was neither required by ERISA nor provided for by the terms of the Plan. SER 421-22. Because of the parties' inability to agree on acceptable terms for an additional review of Ficalora's appeal, no further review was conducted after the Plan Administrator's final determination of January 21, 1993. CR 51, ¶ 6.

II. REASONS FOR DENYING THE PETITION

A. THE DIFFERENCE IN APPROACHES USED BY FEDERAL COURTS IN WEIGHING A FIDUCIARY'S CONFLICT OF INTEREST IS NOT A MATTER OF SIGNIFICANT IMPORTANCE JUSTIFYING REVIEW.

Since *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), federal courts have set about the task of "develop[ing] a coherent method for integrating factors such as self-interest into the legal standard for reviewing benefits determinations." *Brown v. Blue Cross & Blue Shield*

of Ala., Inc., 898 F.2d 1556, 1561 (11th Cir. 1990). "[A]ll of the circuit courts agree that a conflict of interest triggers a less deferential standard of review. The courts, however, differ over how this lesser degree of deference alters their review process." *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 (10th Cir. 1996). There is thus no conflict among the circuit courts regarding whether a plan administrator's conflict of interest must be weighed as a factor in reviewing the administrator's decision to deny benefits.

Although the circuit courts have articulated different approaches to weighing a conflict of interest as a factor, the differences are not a matter of importance. Rather, the different approaches reflect efforts to refine consideration of possible bias. *See, e.g., Brown*, 898 F.2d at 1564 (agreed with "sliding scale" court that " 'the arbitrary and capricious standard may be a range, not a point,' " but determined that it "must fix more precisely the method for evaluating the abuse of discretion.") (quoting *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987)).

Although Petitioner and certain courts have described two approaches, the range of approaches is more varied. The different approaches applied by the courts often appear to overlap rather than conflict. *See Wildbur v. Arco Chem. Co.*, 974 F.2d 631, 638 (5th Cir. 1992) (noting that it had "instructed district courts to evaluate inferences of lack of good faith on a sliding scale" and that the Eleventh Circuit's presumptively void approach

is "[c]onsistent with this analysis").[5] This is because the different methods are underpinned by a common goal of modulating the degree of deference given to an administrator in light of the particular circumstances. *Compare Brown*, 898 F.2d at 1568 (a "presumptively void" court emphasizing that "a fiduciary operating under a conflict of interest may be entitled to review by the arbitrary and capricious standard . . . but the degree of deference actually exercised in application of the standard will be significantly diminished") *with Van Boxel*, 836 F.2d at 1053 (a "sliding scale" court noting that "[f]lexibly interpreted, the arbitrary and capricious standard . . . allows the reviewing court to make the necessary adjustments for possible bias in the trustees' decision").

A review of application of different approaches by federal courts gives no indication that the differences affect the results of the review. For example, as one Ninth Circuit panel remarked, "[t]he precise nature of the less deferential review in this context is not clear" but "[n]o matter what the formulation" the result would be the same in the circumstances of that case. *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1474 (9th Cir. 1993).

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[5] Although petitioner cites *Wildbur* as authority for the proposition that the Fifth Circuit follows a "sliding scale" approach, that court has continued to look to the Eleventh Circuit's "presumptively void" approach. For example, *Jones v. Sonat, Inc.*, 997 F.2d 113, 116 (5th Cir. 1993) ("[f]ocusing on the question of lack of good faith, we are guided by the Eleventh Circuit's holding"), suggests that the Fifth Circuit could more accurately be described as one of the circuits employing a two-step, burden-shifting approach, which it views as a refinement of the "sliding scale" approach.

There is thus no compelling reason for this Court to interfere with the weighing of conflicts of interest by federal circuit courts. All the circuits are following the guidance of this Court in *Firestone* by weighing a conflict of interest in determining whether an administrator has abused its discretion in denying benefits. The fact that courts have formulated different approaches for weighing such conflicts is not a matter of importance requiring the attention of this Court.

B. REVIEW BY THIS COURT AT THIS TIME IS PREMATURE.

Even if the issue of how conflicts of plan administrators are to be weighed were considered an important matter, review by this Court at this time would be premature. Federal courts weighing a conflict of interest have employed a variety of approaches, not just two. For example, although petitioner groups the Eighth, Ninth and Eleventh Circuits together, the approaches used by the three circuits are not identical. *See Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1267 (8th Cir. 1997) (explaining that standard applied by the majority does not follow the reasoning of the Eleventh Circuit) (Beam, J., dissenting); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995) (noting that it has applied an approach "similar to that of the Eleventh Circuit"); *Best v. Nissan Motor Corp.*, 973 F. Supp. 770, 776 (M.D. Tenn. 1997) ("The Ninth Circuit has employed a slightly different version of the shifting burden approach.")

Even within federal circuits, different panels of judges have employed different approaches in different

situations. *See, e.g., Palmer v. University Medical Group*, 973 F. Supp. 1179, 1190 (D. Or. 1997) (in some cases Ninth Circuit "has applied the 'sliding scale' methodology, while in other cases it has used the 'presumptively void' approach").

Continued experience with weighing of conflicts of interest in different circumstances over time may well result in the evolution of a general rule or a series of rules to be applied in different factual situations. *See id.* at 1189-90 (recommending that different methodologies be used depending on the type of ERISA decision being reviewed). Because the federal courts are still developing means of integrating a conflict into their review of administrators' decisions, this Court should defer addressing the issue at this time. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (certiorari denied where the issue requires "further study" in lower courts "before it is addressed by this Court").

C. THIS CASE DOES NOT PRESENT CLEARLY THE ISSUE OF WHETHER A PARTICULAR APPROACH IS PREFERRED WHEN WEIGHING A CONFLICT OF INTEREST.

This case involves a disability plan applicant who refused repeated requests from the plan administrators to provide medical evidence that his condition prevented him from taking employment, as required for benefit eligibility under the terms of the plan. As the district court observed, "the records are replete with plaintiff's reluctance to take medication which might relieve some

of his symptoms, and refusal to present himself for further examination." Pet'r's App. B. at 9. Given the strong evidence in the record establishing Ficalora's ongoing refusal to cooperate with IBM's requests for information about the extent of his disability, and the lack of objective medical evidence regarding whether he was capable of any employment, the denial of his benefits would have been upheld irrespective of the approach adopted. As such, this case does not clearly present the issue of whether a single, uniform approach – and which approach – should be adopted.

III. CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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Supreme Court, U.S.
FILED
MAR 19 1998
CLERK

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No. 97-1269

IN THE

Supreme Court of the United States

October Term, 1997

ROBERT FICALORA,
Petitioner,
v.
INTERNATIONAL BUSINESS MACHINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

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REPLY TO BRIEF IN OPPOSITION

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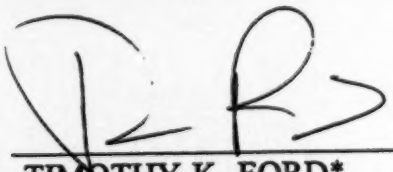
1. Respondent's Brief in Opposition conflates the medical record as it stood before petitioner was definitively diagnosed with multiple sclerosis (MS). Although IBM long refused to admit it, there is no longer any dispute that petitioner has MS, and it was conceded by respondent below. See Pet. App. A 7. The factual issue on which petitioner's entitlement to disability benefits turned -- first raised by IBM after petitioner's MS diagnosis was undeniable -- was whether MS disabled him from work. IBM denied benefits, saying it was not satisfied with petitioner's proof of disability. Ibid. Yet every physician that has rendered an opinion on that subject has said that petitioner is unable to work, or should retire, and no one has said he is able to work. See Pet. App. A 23-26.

2. The courts below were able to affirm IBM's decision only because they applied the most deferential standard of review. Even under that standard, one of the three judges of the Court of Appeals below would have reversed IBM's decision. See Pet. App. A 26. Under any less deferential standard, IBM's decision would almost certainly have been reversed. Therefore, contrary to respondent's submission, the standard of review was determinative of the outcome of this case below.

3. The standard applied by the courts below was exactly the same standard as they would have applied if IBM had not been burdened by a conflict of interest. Under the Ninth Circuit approach, once IBM produced some evidence that the conflict of interest did not affect its decision to deny benefits, its undeniable conflict no longer weighed in the balance. See Pet. App. A 6. This cannot reasonably be characterized as merely a "different approach" for meeting the requirement of Firestone v. Bruch, 489 U.S. 101 (1989) that a "conflict must be weighed as a factor in determining whether there is an abuse of discretion." 489 U.S. at 115. (emphasis added; internal punctuation and citation omitted). To the contrary, this all-or-nothing approach is "directly contrary to Supreme Court precedent established in Firestone v. Bruch." Armstrong v. Aetna, 128 F.3d 1263, 1266 (8th Cir. 1997) (Beam, J., dissenting).

4. Respondent may be correct that the split among the Courts of Appeals includes three or more distinct positions. Brief in Opposition, p. 8. However, if true, that hardly makes this case less appropriate for review under Rule 10(a). The lower courts are not experimenting with this standard; they are disagreeing about it. The Ninth Circuit is holding to its position despite the criticism of the other circuits and even its own District Courts below it. See Petition, pp. 11-12. The circuits are having this disagreement over a preemptive area of federal law that directly affects millions of workers and billions of dollars. It is the kind of disagreement this Court sits to resolve.

Respectfully submitted,



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